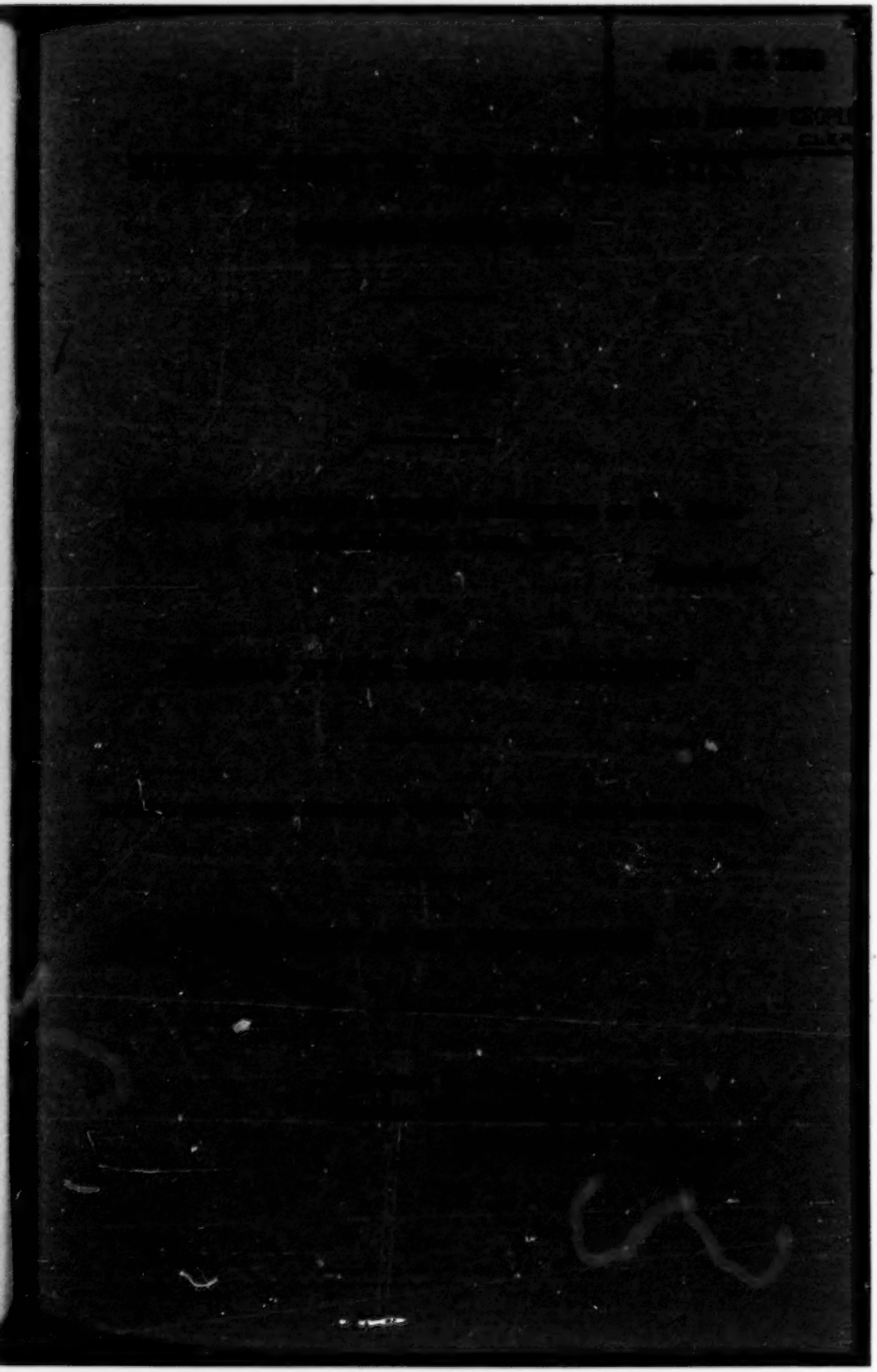

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 284

PHILLIP BOURQUARDEZ, AS RECEIVER OF SIX MILE CREEK KENNEL CLUB, INC., A CORPORATION,

Appellant,

vs.

FLORIDA STATE RACING COMMISSION

APPEAL FROM FINAL JUDGMENT OF SUPREME COURT OF FLORIDA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as Amended, Petitioner-Appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Florida entered in this cause.

Opinion Below

The opinion of the Supreme Court of the State of Florida is reported in 45 So. 2d 876, a copy of which is attached

hereto as Appendix D. A copy of the Order denying the Petition for Rehearing May 24, 1950, is attached hereto as Appendix E. An opinion of the Supreme Court of Florida, affirming a decree declaring the permit valid and outstanding is reported in 42 So. 2d 87, and a copy is attached hereto as Appendix C.

Question Presented

Did the State court err in failing to hold, as alleged by appellant in his petition in an original proceeding for Writ of Certiorari in the Supreme Court of Florida, that the Florida State Racing Commission, in its resolution and order of October 14, 1949, cancelling, annulling and holding for naught the permit here involved, did not proceed in said cause according to the essential requirements of the law (page 5 of the Petition), in that the failure to afford the notice, hearing, or opportunity to be heard essential under the due process of law clause of the United States Constitution, 14th Amendment, renders invalid the following proviso, paragraph 4 of Section 6 of Chapter 17276, Laws of Florida, 1935:

> "Provided further that all permits and licenses heretofore issued by said Commission to persons, associations or corporations, prior to January 1st, 1935, which shall not conduct a racing meet within twelve months from the passage of this Act under and by virtue of said permits and licenses be and the same shall be cancelled and annulled",

attached hereto as Appendix A, under which, for condition broken, the permit of any holder may be revoked without notice to him. (Page 9 of the Petition).[1]

---

[1] All the points raised in the Assignment of Errors are also presented. The question presented, stated above, sets forth the major issue.

Statutes Involved

Paragraph 4 of Section 6 of Chapter 17276, Laws of Florida, 1935, is set forth in Appendix A hereto. Florida Statutes, 1941, Section 16.20, is set forth in Appendix B hereto.

Statement

The Legislature of the State of Florida, by Chapter 14832, Laws of 1931, the original racing law, proposed to any person, association or corporation, as aptly stated by Mr. Justice Davis in *Chenango Bridge Co.* v. *Binghampton Bridge Co.*, 3 Wall. 51, 18 L. Ed. 137, 143: "If you will embark, with your time, money and skill, in an enterprise which will accommodate the public necessities, we will grant to you * * * privileges that will justify the expenditure of your money and the employment of your time and skill", and the corporation, of which petitioner is Receiver, did embark with its time, money and skill in the enterprise mentioned in the proposal, and did construct a suitable track and conduct dog race meetings, and thereby incurred indebtedness now owed to its creditors here represented by appellant Receiver.

A racing permit was duly issued and ratified by vote of the people of Hillsborough County, Florida, and racing thereunder began. The State Circuit Court, upon a bill filed in equity by a creditor on behalf of himself and all others similarly situated, appointed appellant Receiver of the corporate permit holder and authorized the Receiver to operate the track. However, the Florida State Racing Commission *wrongfully* revoked the permit, and that revocation was quashed upon petition in an original proceeding for Writ of Certiorari by the Supreme Court of Florida in *Six Mile Creek Kennel Club, Inc., et al.* v. *State Racing Commission*, 119 Fla. 142, 161 So. 58. Thereafter

the Legislature of Florida, by paragraph 4 of Section 6 of Chapter 17276, Laws of 1935, enacted:

> "Provided further that all permits and licenses heretofore issued by said Commission to persons, associations or corporations, prior to January 1st, 1935, which shall not conduct a racing meet within twelve months from the passage of this Act under and by virtue of said permits and licenses be and the same shall be cancelled and annulled",

attached hereto as Appendix A, and hereinafter referred to as "the proviso". However, before time for compliance with the proviso, the Racing Commission again *wrongfully* revoked the permit. (Petition for Certiorari in the Supreme Court of Florida, page 3). *The proviso contained no provision for notice to, or opportunity to be heard by the holder of a permit.* Thereafter the proviso was omitted from Florida Statutes, 1941, and expressly repealed by Section 16.20 thereof (Appendix B). Subsequently, in the suit for declaratory decree by the Receiver against the Racing Commission, the Circuit Court of Hillsborough County, Florida held the permit "valid and outstanding". (Petition for Certiorari, page 4.) After an appeal of the Racing Commission from this decree had been submitted to the Supreme Court of Florida for determination the Legislature of Florida enacted Chapter 25242, Laws of 1949, an attempted judicial decree by the legislative power (*Harris, et al.* v. *State ex rel. Wester,* 159 Fla. 195, 31 So. 2d 264) purporting to cancel the permit. Thereafter the decree of the Circuit Court, declaring the permit "valid and outstanding", was affirmed by the Supreme Court of Florida in *Florida State Racing Commission, et al.* v. *Bourquardez,* 42 So. 2d 87. Thereafter, October 14, 1949, the Racing Commission again revoked the permit a third time (Petition for Certiorari, page 4). The proviso (Appendix A) did

not afford, the original Racing Law (Chapter 14832, Laws of 1931) did not afford, the Racing Commission, a Commission of limited jurisdiction, did not in its order of revocation (Petition for Certiorari, Exhibit D, pages 17-20, inclusive) recite that it had afforded, and the Racing Commission did not and it is nowhere claimed that it did afford, to the holder of the permit here involved, the notice hearing, or opportunity to be heard essential under the due process of law clause of the United States Constitution, 14th Amendment.

Jurisdiction

Thereupon, appellant, in an original proceeding for writ of certiorari in the Supreme Court of Florida, alleged *inter alia* that the Florida State Racing Commission, in its Resolution and Order of October 14, 1949, cancelling, annulling and holding for naught the above described permit, did not proceed in said cause according to the essential requirements of law, in that the failure to afford the notice, hearing, or opportunity to be heard essential under the due process of law clause of the United States Constitution, 14th Amendment, renders invalid the above quoted proviso of Section 6 of Chapter 17276, Laws of Florida, 1935, under which, for condition broken, the permit of any holder may be revoked without notice to him, and prayed that the Court will quash said Resolution and Order of said Florida State Racing Commission (Petition for Certiorari, pages 5, 9, 10, 11). However, the Court based its decision squarely upon the proviso and sustained the validity of the proviso and the revocation without notice, saying: "The Commission was commanded to vitiate a license or permit issued prior to 1 January, 1935 if the holder had not conducted a meet within the twelve months following passage of the act". *Bourquardez* v. *Florida State Racing Commission*, 45 So. 2d 876 (Appendix D). That decision was

rendered April 26, 1950 and a petition for rehearing duly filed by petitioner-appellant was considered and denied May 24, 1950. A petition for appeal is presented to the State Court herewith, to-wit, on August 7th, 1950. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Furman* v. *Nichol*, 8 Wall. 44, 19 L. Ed. 270; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Largent* v. *Texas*, 318 U. S. 418, 87 L. Ed. 873; *Murray* v. *Charleston*, 96 U. S. 432, 24 L. Ed. 760.

The Grounds Are Substantial

Racing is still legal in Florida. The ground for cancellation stated in the proviso is not one for the protection of public health or public morals. Millions of dollars are invested in racing plants in Florida. If cancellation of a racing permit without notice and opportunity to be heard essential under the Federal Constitution be sustained confidence in racing permits will disappear and the resulting instability and uncertainty will doom racing in Florida; an investment of permit holders in permit plant and equipment will be a hazardous investment not likely to attract those who might hold racing on a high plane of sportsmanship. The racing permit here involved is assignable and transferrable (Florida Statutes, 1941, Section 550.21) and is immensely valuable. For instance, the 1949 track revenue of the only other dog race track in Hillsborough County, Florida (the Capone gang track of which William H. (Bill) Johnston is President) was $739,169.75 for its 90 days (the statutory limit to operation of any track of the 170 day annual racing season), as the Court judicially knows from official records of the office of the Comptroller of the State

of Florida and from the "Eighteenth Annual Report of the Florida State Racing Commission to the Governor of Florida for the Fiscal Year ending June 30, 1949, pages 14 and 15". And, no new permit may be issued at a location within 100 miles of this permit (Florida Statutes, 1941, Section 550.05).

1. The permit here involved is a privilege which was issued in an administrative proceeding and ratified by a vote of the people. The proviso did not afford, the Racing Law did not afford, the Racing Commission, a commission of limited jurisdiction, did not in its order of revocation recite that it had afforded, and the Racing Commission did not and it is nowhere claimed that it did afford, to the holder of the permit here involved, the receiver or the court appointing him or the creditors represented by him, the notice, hearing or opportunity to be heard essential under the due process of law clause of the United States Constitution, 14th Amendment, and this failure renders invalid the proviso and the revocation without notice. In *Garfield* v. *United States ex rel. Goldsby*, 211 U. S. 249, 262; 53 L. Ed. 168, 175, it is held:

> "In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an *administrative* or judicial *proceeding* cannot be deprived of them without notice and an opportunity to be heard.
>
> "The right to be heard before property is taken or rights or *privileges* withdrawn *which have been previously legally awarded* is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court." (Emphasis supplied).

2. The proviso, and the Racing Law, nowhere contain provisions for due notice to the receiver or the Court appointing him or the creditors represented by him, and the proviso and the revocation without notice are invalid.

> "'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity (425) to be heard.' * * * 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute'. * * * 'This notice must be provided as an essential part of the statutory provision' ".
>
> Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 424, 425, 59 L. Ed. 1027, 1032.

The revocation clearly involves the idea of punishment for supposed infringement of the law, and "a condition of its imposition is notice and hearing." *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, 392, 67 L. Ed. 318, 321. "A hearing by an administrative body of the parties to be affected by its determination is essential to due process." *Shields* v. *Utah Central R. Co.*, 305 U. S. 177, 83 L. Ed. 111, headnote 5.

3. No power of repeal of the privilege was reserved in the Constitution or statutes of the state, and the revocation of the privilege was for condition broken, i.e., failure to conduct a race meeting within twelve months from passage of the proviso. Valid cancellation of the privilege for condition broken cannot be accomplished without giving to the holder of the permit an opportunity to have the asserted default judicially determined: "The

reserved power to repeal a grant of special privileges implies that it may be exerted at the pleasure of the legislature or other authority in which the power to repeal is vested. * * * That power is plainly distinguishable from the power to cancel for violation of the terms of the grant. In the absence of constitutional, legislative or contractual restriction, the exertion of the first mentioned power requires nothing more than an appropriate declaration of the repeal. * * * But, without consent of the holder, valid cancellation for condition broken cannot be accomplished without giving to the holder an opportunity to have the asserted default judicially determined. * * *". *Public Service Commission* v. *Havemeyer*, 296 U. S. 506, 517; 80 L. Ed. 357, 364.

4. The Racing Commission having rendered it impossible for the permit holder to perform the condition of the proviso by wrongfully revoking the permit before the time for performance (Petition for Certiorari in state court, page 10), the Racing Commission cannot take advantage of nonperformance as a ground of forfeiture, for, in the words of Mr. Justice Swayne in *Davis* v. *Gray, Receiver*, 16 Wall. 203, 21 L. Ed. 447, 456, "Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the State herself." Such conduct constituted an arbitrary deprivation of appellant's rights in violation of the United States Constitution, 14th Amendment. "No such arbitrary power can exist where the principles involved in due process are recognized." *Yamataya* v. *Fisher*, 189 U. S. 86, 101, 47 L. Ed. 721, 726.

It is submitted that the judgment and decision of the Supreme Court of Florida erred in sustaining the validity of the proviso and the revocation without notice against the contention made by petitioner-appellant that both were

repugnant to the 14th Amendment to the Constitution of the United States in that the statute contained no provision for, and the Racing Commission did not afford to the appellant receiver, the court appointing him, or the creditors represented by him, notice and opportunity to be heard before such revocation. Moreover, the Racing Commission wrongfully created "the facts which gave rise" to its so-called duty to revoke the permit. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

THOMAS M. SHACKLEFORD, JR.,
HENRY ELLIOT WILLIAMS,
Counsel for Appellant.

APPENDIX A

THE PROVISO

Paragraph 4 of Section 6 of Chapter 17276, Laws 1935:

> "Provided further that all permits and licenses heretofore issued by said Commission to persons, associations or corporations, prior to January 1st, 1935, which shall not conduct a racing meet within twelve months from the passage of this Act under and by virtue of said permits and licenses be and the same shall be cancelled and annulled."

APPENDIX B

Florida Statutes 1941, Section 16.20, repealing omitted proviso:

> "Statutes repealed.—Every statute of a general and permanent nature enacted by the State of Florida, or by the Territory of Florida, and every part of such statute not included in the Florida Statutes, 1941, or recognized and continued in force by reference therein is hereby repealed, effective as of the time the said 'Florida Statutes, 1941' become effective and are in operation."

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1949

EN BANC

FLORIDA STATE RACING COMMISSION, et al., *Appellants*,

vs.

PHILLIP BOURQUARDEZ, as Receiver, *Appellee*

Opinion filed August 2, 1949.

An Appeal from the Circuit Court for Hillsborough County, L. L. Parks, Judge,

Manuel M. Garcia and Reeves, Allen & Johnson, for Appellants,

Henry E. Williams and W. Marion Hendry, for Appellee.

T. M. Shackleford, Jr., as Amicus Curiae.

THOMAS, J.

The appellee filed a bill for declaratory decree, praying that the court determine his right, as receiver of Six Mile Creek Kennel Club, to a license to operate a dog track under a permit originally issued to the club in 1931, and, incidentally, to decide what personal responsibility he would undergo in the operation.

From the entire record in the case we find that after the operation of the dog track was ratified by the voters, racing was conducted on the property from 7 December 1932 for twelve days, and then discontinued. The following month a suit was instituted against the corporation, and it was in this litigation that the appellee was appointed receiver. Immediately afterward he was authorized to resume the racing, but evidently before he undertook to do so the permit was revoked, and in the litigation which followed, this order of revocation by the commission was quashed. Six Mile Creek Kennel Club v. State Racing Commission, 119 Fla. 142, 161 So. 58. The only assets of

the club remaining in his hands are the permit of 1931 and such interest as the club, as lessee, has in the lands upon which the track was located, the lands being of no value, according to the allegation of the bill, without use of the permit. The receiver, because of doubt about his right to sell the permit, has sought the advice of the court.

These, in substance, are the allegations of the bill.

It appears from the testimony in the case that the enterprise is presently moribund. From the statement given by the appellee himself it seems that nothing whatever has been done toward holding racing meets on the land since 1935. At that time he sent a telegram to the Racing Commission to have dates for races assigned, and this application was not considered because he did not file "an application for license" and tender a bond. It appears further from his testimony that long ago the equipment was sold and the buildings razed, while another witness, introduced by the appellee, testified that there was no racing plant there now and no evidence that a race track was at one time located on the property except that one familiar with the premises at the time could see a trace of the outlines of the circular track.

There is more to the facts than we have related, but this seems sufficient to decide the point of law involved which the circuit judge thought determined the controversy—that is, whether Section 6 of Chapter 17276, Laws of 1935, providing "that all permits and licenses heretofore issued by said Commission to * * * corporations, prior to January 1st, 1935, which shall not conduct a racing meet within twelve months from the passage of this Act under and by virtue of said permits and licenses be and the same shall be cancelled and annulled" is self-executing. It was the opinion of the veteran chancellor in this case that when this section was read with the two sections immediately preceding it, it was clear that affirmative action by the Racing Commission was necessary to effectuate a forfeiture of the permit and that since no such action had been taken, the permit was still an asset in the hands of the receiver, who was therefore authorized to apply to the Racing Commission for their consent and approval to transfer it.

It is necessary now to give the two preceding sections to which the circuit judge referred. As a preface we should say that when an application for a permit to conduct races is issued it becomes effectual only when ratified by a majority of the voters participating in an election in the county where the racing is to take place. In Section 6 it is provided that the holder of a permit shall have the right to have submitted to the electorate the question whether racing under it shall be approved, and the manner of holding the election upon the application of the permittee is specified. Then there appear the provisos: first, that where the holder makes no such application to the Board of County Commissioners within six months, the permit shall become invalid and "the Commission is hereby authorized to cancel such permit without notice to the holder thereof"; second, that where the holder fails to construct a suitable track within twelve months after the ratification, the permit shall likewise be invalid and "the Commission is hereby authorized to cancel such permit without notice to the holder thereof"; third, the proviso already quoted, that permits issued prior to 1 January 1935 held by persons who have not conducted a racing meet within twelve months of the passage of the act shall be "cancelled and annulled."

Of course the difference is that in the first two provisos specific authority is granted the commission to cancel a permit declared "null and void," while in the last section there is no reference to authorization to cancel the permit nor a declaration that it shall be null and void, but simply that the permit shall be "cancelled and annulled."

The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act but to the manner in which it is punctuated. State ex rel. Hanbury v. Tunnicliffe, 97 Fla. 731, 124 So. 279.

The language employed was unfortunate, as is evidenced by the litigation that has grown from it, and we are unable to comprehend why there was a distinction be-

tween the phraseology used in the first two provisos and that used in the third.

Disregarding for the moment the express grant of authority in the first two provisos to cancel permits in certain instances, it is clear that the legislature in those provisos used adjectives to fix the status of those permits as invalid and worthless, while in the third the legislature simply commanded that a permit issued before a certain date and remaining dormant for twelve months after the passage of the act should be cancelled and annulled; and in the use of those transitive verbs it must have been contemplated that some affirmative action should be taken by the racing authority to render the permit useless.

We are at a loss to understand why, in the first two instances, the commission was granted authority to cancel a worthless and invalid permit, but at the worst it could be only surplusage. The verbs employed in the third proviso, when given their proper meaning, convey to us the idea that affirmative action was ordered taken upon the happening of a certain event.

The question is one of grammar more than of law, and we are impelled to the conclusion that the decree should be——

Affirmed.

ADAMS, C. J., TERRELL, CHAPMAN and SEBRING, J. J., concur.

BARNS, and HOBSON, J. J., dissent.

BARNS, J., dissenting:

Some of the observations of the Chancellor in his final decree were as follows:

> "This matter coming on to be heard upon final hearing and the Court having heard arguments of counsel and considered the record in this cause finds and is of the opinion that the real crux of the case depends upon whether that part of Section 6, Chapter 17276, Laws of 1935, reading:

> 'Provided further that all permits and licenses heretofore issued by said Commission to persons, associations or corporations, prior to January 1st, 1935, which shall not conduct a racing meet within twelve months from the passage of this Act under and by virtue of said permits and licenses be and the same shall be cancelled and annulled.'

is self-executing or that action of the Commission was necessary to make the forfeiture of the permit effective. In view of the provisions of this portion of that section and those preceding it, all dealing with forfeiture or termination of permits, it would seem clear that some action by the racing Commission was necessary to effect a forfeiture or loss of the permit. No such action was ever taken. In such view I am constrained to hold that the permit still exists and is an asset in the hands of the Receiver who is authorized to apply to the Commission for their consent and approval to transfer or assign said permit in accordance with the law in such cases made and provided. There are other points argued for and against the validity of the permit, all of which have been considered, but I believe the matter dealt with in this order is the turning point and decisive in this cause."

It is my conclusion that when the specified defaults occur the license becomes cancelled and annulled and a hearing could only be for the inquisitorial purpose of determining whether any such facts in controversy occurred. The permit under the quoted provisions was cancelled upon the failure to operate and not if and when the Racing Commission might act. Action by the Racing Commission was permissive but not necessary and furthermore the permit under the circumstances has clearly been abandoned. No racing meet has been held since 1932.

HOBSON, J., concurs.

HOBSON, J., concurring in dissenting opinion:

I concur in the opinion prepared by Mr. Justice Barns and agree that the quoted provision of Section 6, Chapter 17276, Laws of 1935, is self-executing.

I lay no claim to being a grammarian, nor have I been accused of possessing the tendencies or qualifications of a philologist. However, my recollection of the smattering of rules of grammatical construction which I absorbed in the yester-years dictates a different conclusion from the one reached by some of my esteemed associates concerning the proper interpretation to be given the language of Section 6, Chapter 17276, Laws of Florida, 1935.

It is my view that the majority opinion fails to give due consideration to the verbiage "• • • said permits and licenses *be and* the same shall be canceled and annulled." (Italics supplied.) The intransitive verb "be" in the sense in which it is used is in the indicative present tense, third person plural. This form of said verb is no longer commonly used but it has been retained and is frequently found in legislative enactments as well as in orders, judgments and decrees of courts of law and equity. It means that such licenses and permits are hereby, now, presently, canceled and annulled and that such action shall become conclusively effective upon a condition subsequent, i. e. the event of non-operation for a period of twelve months from the passage of said act. In other words, the language "and the same shall be cancelled and annulled" means that such cancellation already legislatively declared shall become operative by application of the act itself when any holder of a permit or license "shall not conduct a racing meet within twelve months from the passage" of said law. It does not mean that such license or permit shall be canceled and annulled or revoked by order of the Commission as is expressly provided in preceding sections. The use of the conjunctive (and) rather than the disjunctive (or) is likewise significant.

The question presented in and by this appeal does not turn entirely upon the grammatical construction of the

substantive defective verb "be" and the admittedly future tense phrase formed by its conjunction with the verb "shall." The primary question involved as to whether Section 6, supra, is self-executing hinges likewise upon a well recognized principle of legal construction. The principle of which I speak is one to the effect that when in an act of the Legislature express direction is given or authority is delegated to any agency in one or more sections of such enactment to do specific acts under certain conditions, the failure to include such direction or authority in another section which deals with the same or a similar subject is the equivalent of a direct exercise—not a delegation of—such power or authority.

The deliberate inclusion of direction or authority in some sections of an act and the equally deliberate exclusion thereof from another does not permit the presumption that the legislature intended to do that which it obviously refrained from doing. On the contrary, the presumption is, and should be, that it meant what it said and that its action (in omitting a delegation of power and directly exercising said power) was intentional—not fortuitous. It was held in the case of Solomon Wine v. Comm. of Massachusetts, 17 N. E. (2) 545, 120 A. L. R. 889, as follows:

> "Where language is used in one section of a statute different from that employed in other sections of the same chapter * * * it is to be presumed that the language is used with a different intent."

In 50 Am. Jur., Sec. 274, page 262, will be found the following:

> "The use by the legislature of certain language in one instance and wholly different language in the other indicates that different results were intended and the courts have so presumed. Under this rule, where language is used in one section of the statute different from that used in other sections of the same chapter it is to be presumed that the language is used with a different intent. Accordingly, the presence of a provision in one section of a statute and its absence from

another are an argument against reading it as implied by the section from which it is omitted."

See also Atchison, Topeka & Santa Fe R. R. Co. v. U. S., 220 U. S. 37; 25 R. C. L. Sec. 248, page 1009.

It is my considered opinion that it makes little practical difference what our conclusion may be in the instant case for if Section 6 of Chapter 17276, Laws of Florida, 1935, is not self-executing then it certainly prescribed a continuing duty upon the Florida Racing Commission to cancel and annul licenses and permits which were issued prior to January 1, 1935, and under which no racing meets were held during the twelve months period succeeding the passage of said Section 6. This duty would still subsist and the only defense to its performance would be a showing as a matter of fact that at least one racing meet was held within the twelve months period following the passage of said provision.

BARNS, J., concurs.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, 1950

EN BANC

PHILLIP BOURQUARDEZ, *Petitioner,*

vs.

FLORIDA STATE RACING COMMISSION, *Respondent*

Opinion filed April 25, 1950.

Original jurisdiction—Writ of Certiorari to the Florida State Racing Commission.

Henry E. Williams and W. Marion Hendry, for Petitioner.

Manuel M. Garcia and Reeves Allen & Johnson, for Respondent.

THOMAS, J.

This case is a sequel to the one reported in 42 So. 2d 87, where the history of the litigation was outlined. We affirmed the chancellor in his decision that the provisions of that part of Section 6 of Chapter 17276, Laws of Florida, Acts of 1935, with reference to the cancellation of any permit where the holder failed to conduct racing within twelve months after the passage of the act, were not self-executing but that affirmative action on the part of the Florida State Racing Commission was required to cancel if the permittee had failed to hold a racing meet within the prescribed period.

Following the decision of this court, the commission adopted a resolution annulling the permit originally issued to Six Mile Creek Kennel Club, then in the hands of Phillip Bourquardez, as receiver. This action, contends the respondent, was a continuing duty under the act we have cited and was also consistent with a subsequent act of the legislature, Chapter 25242, Laws of Florida, Acts of 1949, cancelling permits of all permittees, including court-appointed receivers, who had not conducted racing meets for five years.

In reply, the petitioner insists that the 1949 act is inapplicable because it is unconstitutional, is an "attempted judicial decree by legislative power," and so on; that the commission had been stripped of its authority to cancel permits in accordance with the 1935 act, supra, for the reason that in the adoption of the Florida Statutes, 1941, that part of the act was omitted, hence was repealed. This last position, counters respondent, is without merit because only those statutes of a general and permanent nature were repealed by omission and this particular act did not fall in that category.

Thus there are presented to us many complicated propositions, but we do not think we are obliged to consider all of them. There is much ado about a permit which, from a practical standpoint, is of small consequence. It was issued nearly nineteen years ago, and racing was conducted for the short period of thirteen days seventeen years ago. Three years later a feeble attempt was made

to hold another meet, but this did not actually transpire. There is no track in existence, and it disappeared so long ago that no evidence of it is now apparent save to one who was familiar with it at the time.

Taking up first the point of the repeal of the 1935 act by omitting it from the Florida Statutes of 1941, it is our idea that even if this law was of such general and permanent nature as to have been repealed by the omission, still the duty of the racing commission in the premises and the facts which gave rise to this duty twelve months after the law's passage were not affected. The commission was commanded to vitiate a license or permit issued prior to 1 January 1935 if the holder had not conducted a meet within the twelve months following passage of the act.

There is no doubt that the license involved was issued before 1 January 1935, nor is there any contention that racing was conducted within the prescribed year. So immediately the stated period expired a duty devolved on the commission to cancel the permit if the passivity of the holder continued for that length of time, and the duty continued from day to day until it was discharged by the adoption of the resolution 14 October 1949.

This duty was evidently devoid of any discretion and, in reality, was ministerial even though it had been necessary for the commission to determine the fact of inaction (Roberts, Treasurer, v. U. S., 176 U. S. 221, 20 Sup. Ct. 376, 44 L. Ed. 443), an element which requires no discussion because there is no claim that there was any racing within the stated year. Nothing remained for the commission to do except administer the *coup de grace* to a permit that had expired by the passage of time and by nonuse. When this function was performed it became effective *nunc pro tunc* the day in 1936 corresponding to the day in 1935 when the act was passed.

Being firm in the conviction that the formal action which should have been taken long before the adoption of Florida Statutes, 1941, was merely ministerial and unaffected by omission from this compilation, we see no need of discussing the other questions presented by petitioner.

The petition for certiorari is denied.

ADAMS, C. J., TERRELL, CHAPMAN, SEBRING AND HOBSON, J. J. concur.

APPENDIX E

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM A. D. 1950

Wednesday, May 24, A. D. 1950.

PHILLIP BOURQUARDEZ, *Petitioner,*

vs.

FLORIDA STATE RACING COMMISSION, *Respondent*

Original Jurisdiction Certiorari to Florida State Racing Commission

Counsel for Petitioner having filed in this cause Petition for Rehearing and having been duly considered, it is ordered by the Court that said Petition be and the same is hereby denied.

A true copy,

Test:

GUYTE P. MCCORD (Signed),
Clerk Supreme Court

(SEAL OF THE SUPREME COURT OF FLORIDA)

(9743)

FILED
AUG 31 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 284

PHILLIP BOURQUARDEZ, AS RECEIVER OF SIX MILE CREEK KENNEL CLUB, INC.,

Appellant,

vs.

FLORIDA STATE RACING COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MANUEL M. GARCIA,
Counsel for Appellee.

LEROY ALLEN,
Of Counsel.

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SUPREME COURT OF THE STATE OF FLORIDA

PHILLIP BOURQUARDEZ, AS RECEIVER OF SIX MILE CREEK KENNEL CLUB, INC., A CORPORATION,
Petitioner,

v.

FLORIDA STATE RACING COMMISSION,
Respondent

ORIGINAL JURISDICTION CERTIORARI TO FLORIDA STATE RACING COMMISSION

STATEMENT OF APPELLEE, FLORIDA STATE RACING COMMISSION OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellee, the Florida State Racing Commission, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this its Statement in Opposition to Appellant's Statement As To Jurisdiction. Appellee hereby includes herein its Motion to Dismiss the Appeal or in the alternative to affirm the judgment of the Supreme Court of the State of Florida on the grounds that:

1. The appeal is frivolous

2. There is not presented a substantial Federal question

3. There is no Federal question involved.

The matters herein relied upon by the Appellee are more particularly stated below:

I

The Appeal Is Frivolous

The Florida State Racing Commission is vested with the expressed power to execute, fully and effectually, the State laws relating to racing and authorized to supervise, direct and control racing and race tracks, and in the exercise of this authority the Supreme Court of the State of Florida has, in numerous decisions, held that the Commission is vested with a considerable degree of regulatory power and accorded a wide discretion. Acts 1931, Chapter 14832, as amended by Acts 1935, Chapter 17276; *State ex rel. Hollywood Jockey Club* v. *Stein,* 133 Fla. 530, 182 So. 863; *State ex rel. Mason* v. *Rose,* 122 Fla. 413, 165 So. 347, Act 1949, Chapter 25242.

It has long been established that racing in Florida is within the exclusive control of the State Legislature acting within its police power, and that which the Legislature may drastically regulate it may prohibit entirely.

The Legislature of Florida, on two different occasions, deemed it advisable to enact laws cancelling dormant racing permits for non-use. In 1935 an amendment to the racing laws of 1931, *supra,* was passed, which amendment is the Act now in question. The 1935 amendment provided that racing permits not used within a period of twelve months from the passage of the Act shall be cancelled and annulled. The Racing Commission took the position that the 1935 amendment was self-executing. In 1948 the appellant filed suit in the Circuit Court of Hillsborough County, Florida, to determine the validity of the racing permit in question, which admittedly had not been used and lay dormant for a

period of nearly 17 years, and on appeal from the final judgment of said Circuit Court the Supreme Court of Florida held that the 1935 Act was not self-executing and that affirmative action by the Racing Commission was necessary to cancel the permit. See *Florida State Racing Commission* v. *Phillip Bourquardez*, — Fla. —, 42 So. (2d) 87. In 1949 the Legislature of Florida deemed it advisable to again enact another law cancelling dormant racing permits for non-use, but covering a different period of time than the 1935 Act, and which latter enactment included the permit of appellant. The Racing Commission abided by the opinion of the Supreme Court of Florida, *Florida State Racing Commission* v. *Bourquardez, as Receiver, supra,* did in October, 1949, take affirmative action and did enter an order cancelling the permit of appellant by virtue of the 1935 Act, *supra,* and the interpretation placed thereon by the Supreme Court of Florida, and further because of the passage of the 1949 Act, *supra.* On certiorari to the Supreme Court of Florida, from the Racing Commission's Order of cancellation, from which this appeal is taken, the Supreme Court of Florida affirmatively and unanimously upheld the order of cancellation and held that the Racing Commission had a continuing duty to cancel the permit under the 1935 Act, *supra, Philip Bourquardez* v. *Florida State Racing Commission,* — Fla. —, 45 So. (2d) 876.

There has been no violation of the Fourteenth Amendment to the United States Constitution. The appellant, in his suit in the Circuit Court of Hillsborough County, Florida, to determine the validity of its permit, made the Florida State Racing Commission a party defendant, and, as it affirmatively appears in both of the opinions of the Supreme Court of Florida, heretofore cited, the appellant admitted, without dispute, that its permit had been dormant since 1933 and that no racing had been conducted

under its permit for a period of seventeen years; that long ago its equipment was sold and the buildings razed; that no racing plant existed and no evidence of a race track was presently apparent. Upon this admitted and undisputed testimony of non-use and dormancy, the Florida State Racing Commission cancelled the permit in question.

The Appellant was accorded a full and complete hearing in the Circuit Court of Hillsborough County, Florida, and on two appeals in the Florida Supreme Court. A formal hearing would not and could not adduce new evidence to the contrary. Furthermore, it is submitted that the due process clause protects rights only, and has no reference to mere concessions or privileges which a State may control, and bestow or control at will, or to supposed property rights which a State court has found to be non-existent. 16 CJS Sec. 599, p. 1198. A racing permit in Florida falls into this category and the Florida Supreme Court has held that a racing permit is not a contract but a mere license to do what would otherwise be unlawful, and as such is a privilege which may be granted or withdrawn under certain conditions. *State ex rel. Biscayne Kennel Club* v. *Stein*, 139 Fla. 517, 178 So. 133. The racing laws of Florida, under attack in this appeal, are definite and have a reasonable relationship to a proper Legislative purpose; are not arbitrary and have an equal and uniform application to all racing permits that may fall into the category of non-use.

II

There Is Not Presented a Substantial Federal Question

The decision of the Supreme Court, interpreting and construing the Legislative enactments under attack, were not based or rendered from a Constitutional viewpoint or question.

This Court has frequently held that the Federal question raised must of necessity have been passed on by the State Court. *Mellon* v. *O'Neil*, 275 U. S. 212, 72 L. Ed. 245; *Detroit City Railway Co.* v. *Guthard*, 114 U. S. 133, 29 L. Ed. 118. The Supreme Court of Florida, in its decisions, did not pass upon any Federal question raised.

Suffice it to say that this fact alone is sufficient to warrant this Court in dismissing this appeal, the interpretation of a State statute by the highest Court of that State being binding on this Court. *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40, 70 L. Ed. 818.

Appellant's contention that the 1935 and 1949 Acts, *supra*, violate the due process clause of the Fourteenth Amendment of the United States Constitution is untenable. As heretofore stated, racing in Florida is a privilege and as such may be permitted or withdrawn at the will of the Legislature. A Florida racing permit is not property, nor a property right, nor does it create a contractual or vested right, nor is it a franchise. *State ex rel. Biscayne Kennel Club* v. *Stein, supra.* Legislation which uniformly and equally affects a class of permits as a whole is valid and does not violate the due process clause of the Fourteenth Amendment.

The Racing Commission has first-hand knowledge if racing is conducted by any licensed race track in Florida because of necessity the permit holder must request racing dates and the Commission must direct and supervise the racing operations. If any racing had been held by the permit holder in question, either during the 1935 season or during the period of 1943 through 1948, this fact would have been known to the Racing Commission. The admitted failure by Appellant to conduct racing by virtue of the testimony of appellant himself, taken in the Circuit Court of Hillsborough County, Florida, and as determined by the

Supreme Court of Florida in its decisions that no racing was conducted for seventeen years, gave the Racing Commission the right and duty to revoke the permit under the statute. Under the 1949 Act, which the State Supreme Court did not pass on, the Legislature revoked all permits issued before January 1, 1943, wherein the permittee had not held a racing meet for five years. The right of the Legislature to revoke for non-use is unquestioned. If Courts may revoke for non-use, certainly the Legislature may, especially so, where the grant of the privilege is dependent upon the Legislature in the first instance.

This Court has repeatedly held that the existent need or appropriateness of State legislative action is not for the determination of this Court, that is a matter solely in the discretion of the Legislature. *Olsen* v. *Nebraska*, 313 U. S. 235, 85 L. Ed. 1305; *Valentine Goezart et al.* v. *Clearly, et al.*, 335 U. S. 464, 93 L. Ed. 163. Mr. Justice Sutherland, in referring to a municipal ordinance of Oklahoma City, Oklahoma, in *Walker H. Gant, et al.* v. *Oklahoma City*, 289 U. S. 98, 77 L. Ed. 1058, said:

> "An otherwise valid statute or ordinance conferring a privilege is not rendered invalid merely because it chances that particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend."

Racing in Florida is a privilege and permits are issued conditioned upon use. Dormant permits contribute no revenue to the State, and a hearing could not produce any evidence necessary to withhold revocation by the Commission. As stated aforesaid, the Commission knew or it had to know from the admission of the appellant in Court that there had been no racing in seventeen years.

Appellee asserts that there has been no denial of due process for failure to hold a formal hearing prior to the

revocation of the permit in question. It is further asserted that the enactments of the Legislature under attack in this appeal constitute no impairment of contract or obligation and that there is no substantial Federal question presented.

III

There Is No Federal Question Involved

Under paragraph 1 of this Statement Opposing Jurisdiction we have already discussed somewhat the want of a substantial Federal question but under this topic we consider it appropriate to discuss this matter more fully.

Appellant, with many decisions to the contrary by the Supreme Court of Florida, states with no authority in point, that a racing permit is a franchise, a contract with the State, and cannot be revoked. This is contrary to any opinion of the Supreme Court of this State on the subject of racing permits. *State ex rel. Biscayne Kennel Club* v. *Stein, supra, State ex rel. Hollywood Jockey Club* v. *Stein, supra.*

Appellant's statement that the permit is assignable and transferrable is misleading. Examination of the Florida statute, as cited by appellant on page 7 of his Statement As To Jurisdiction, reveals that the permit is transferrable and assignable only upon application to and approval by the Florida State Racing Commission. It is valuable only if used and if not used by the party to whom it is issued the Legislature may cancel same or empower the Commission to cancel same. It is fallacious to argue that once the Legislature extends a privilege that it may not cancel same for valid reasons. No rights have been acquired, there is no property right in a racing permit, and it is not a contract, nor a franchise. Appellant has had his racing permit for nineteen years and made a feeble attempt at rac-

ing in the early 1930s. The Supreme Court of Florida conclusively found from the testimony of appellant that:

> "It appears from the testimony in this case that the enterprise is presently moribund. From the statement given by the appellant himself, it seems that nothing whatever has been done toward holding racing meets on the land since 1935. At that time he sent a telegram to the Racing Commission to have dates for racing assigned and this application was not considered because he did not file 'an application for license and tender a bond.' It appears further from his testimony that long ago the equipment was sold and the buildings razed while other witnesses introduced by the appellee testified that there was no racing plant there now and no evidence that a race track was at one time located on the property, except that one familiar with the premises at the time could see a trace or outline of a circular track."

A formal hearing could not add or detract from this finding by the Supreme Court of Florida.

Appellant's Statement in his Statement As To Jurisdiction, page 3, borders on the realm of absurdity. The case of *Chenango Bridge Co.* v. *Binghamton*, 3 Wall. 51, 18 L. Ed. 137, at page 143, is cited. That case involved a charter granted by the State for the erection of a bridge; admittedly, a contract with the State, worthy of protection. The language quoted by appellant might be true of a charter but bears no relation to a racing permit. Petitioner's failure to make use of the permit and conduct racing, as required, is duly established by his admissions and other evidence in the State Court case—a hearing before the Commission could establish nothing to the contrary. The statute in question clearly provides that failure to race makes the permit revokable.

It is submitted that no Federal question is involved. If the subject is one which is fairly debatable the enactment of the Legislature and the subsequent construction of that enactment by the highest Court of the State of Florida is conclusive.

WHEREFORE, the appellee submits this statement showing the appeal to be frivolous, that there is presented no substantial Federal question, and that there is no Federal question involved, and respectfully moves the Court to dismiss the appeal or in the alternative to affirm the decision of the Supreme Court of the State of Florida entered herein.

Respectfully submitted,

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